

JAN 13 2006

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN T. DiMARZIO,

Plaintiff - Appellant,

v.

TERRI JACOBS; et al.,

Defendants - Appellees.

No. 05-15750

D.C. No. CV-04-00359-RAM

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
Robert A. McQuaid, Magistrate Judge, Presiding^{**}

Submitted January 9, 2006^{***}

Before: HUG, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

Nevada state prisoner Stephen T. DiMarzio appeals pro se from the district court's judgment dismissing for failure to state a claim his 42 U.S.C. § 1983 action

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} All parties consented in writing to proceed before a magistrate judge.

^{***} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

alleging constitutional violations related to his serious medical condition. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001), and we affirm.

The district court properly dismissed DiMarzio's claims that defendants acted with deliberate indifference by misdiagnosing his ruptured disc. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (recognizing even gross negligence is insufficient to establish deliberate indifference); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (as a matter of law difference of opinion between prisoner and prison doctors fails to show deliberate indifference to serious medical needs).

Because DiMarzio's opening brief does not challenge the district court's dismissal of his due process claims, he has waived his right to challenge that portion of the order. *See Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

The district court did not abuse its discretion in denying DiMarzio's request for leave to amend his second amended complaint after responsive pleadings were filed, because amendment would have been futile. *See Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002).

AFFIRMED.